

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, ex rel,
W.A. DREW EDMONDSON, in his
capacity as ATTORNEY GENERAL
OF THE STATE OF OKLAHOMA,
et al.

Plaintiffs,

V.

TYSON FOODS, INC., et al.,

Defendants.

No. 05-CV-329-GKF-SAJ

REPORTER'S TRANSCRIPT OF PROCEEDINGS

DECEMBER 6, 2007

MOTION HEARING

BEFORE THE HONORABLE SAM A. JOYNER, Magistrate Judge

APPEARANCES:

For the Plaintiffs: Mr. Louis W. Bullock
Mr. M. David Riggs
Mr. Richard T. Garren
Mr. Robert A. Nance
Mr. David P. Page
Mr. Frederick C. Baker
Ms. Kelly S. Burch
Mr. J. Trevor Hammons
Mr. Daniel Patrick Lennington

For the Defendants: Mr. Robert W. George

Glen R. Dorrough
UNITED STATES COURT REPORTER

EXHIBIT

1

1 apply under the federal common law as well, such as the
2 privilege existing between a client or as representative of the
3 client and the attorney or as between representatives of the
4 client or between the client and representative of the client
5 where it's to facilitate legal services, the difference being
6 that for public officers or agencies, as Ms. Longwell pointed
7 out, there must be a pending investigation, claim, or action
8 and there has to be a determination that disclosure of the
9 communication would seriously impair the ability to process the
10 claim, conduct, or investigation in the public interest.

11 The state law, if it were to apply, requires an
12 affirmative finding by the Court for this communication, either
13 it will seriously impair or it won't seriously impair. That
14 puts you in the business in each and every instance of making
15 that determination on a communication-by-communication basis.

16 THE COURT: Okay. So your argument is you don't have
17 to prove there is pending litigation or claims because state
18 law doesn't apply?

19 MR. NANCE: Because state law doesn't apply. And it
20 doesn't apply for the reasons in our brief. In a number of
21 cases we cited, the Perrignon case, Pearson vs. Miller and
22 others in which the Court said that the law of privilege isn't
23 just a law of admissibility of evidence. The primary purpose
24 is to protect confidentiality of communications under
25 circumstances where confidentiality serves broad societal

1 goals. And it would be meaningless to say under 501, well,
2 this is privileged for one purpose but it's not privileged for
3 another, because given the way this case is pled basically the
4 evidence, for instance, on the federal common law of nuisance
5 is going to be the same evidence that's going to apply for most
6 of the state law pendent claims. And a great deal of the
7 CERCLA-related evidence or the RCRA-related evidence is also
8 going to apply on the state pendent claims. You just can't --
9 you can't tease that evidence apart in any sensible fashion
10 that would allow you to say, okay, you know, here we'll apply
11 the federal common law and here we'll apply the state law.
12 It's all so inextricably intertwined that it's going to have to
13 be one or the other.

14 And under these circumstances, as the Perrignon court
15 case said in the absence of any indication of legislative
16 intent in the language or history of Rule 501, the court
17 believes in federal question cases where there's a pendent
18 state claim the federal common law of privilege should govern
19 all the claims of privilege.

20 THE COURT: Is it not true in all of those cases that
21 when they are comparing state and federal law that they sort of
22 adopted the one which rejects the privilege and grants the
23 relief?

24 MR. NANCE: You know, I'm not sure that is right. I
25 don't know for sure, but they didn't decide them on that. They

1 didn't say in case of a conflict, we want the smallest
2 privilege we can get.

3 THE COURT: Right.

4 MR. NANCE: Based on Rule 501 and its legislative
5 history, they said it was the federal common law of privilege.
6 And that's the way it should be because Congress has set that
7 up as the privilege standard in federal question cases and the
8 state legislature simply cannot dictate to a court of the
9 United States a different privilege standard to apply in a
10 federal question case pending in this court. And when the
11 attorney general filed this case in this court, he's bound by
12 Rule 501 and all of the cases that construe it. And in fact, I
13 don't recall any case that they have cited that says in a
14 federal question case with a pendent state claim you oust the
15 federal common law of privilege and you base it on state law.
16 And so that's the analytical framework that the courts have
17 applied. The cases in footnote 7 that I referred you to
18 earlier from the Sprague case, it's just a federal law question
19 in this context.

20 THE COURT: Yeah, they kind of look to see whether
21 federal interest or federal legal rights are being enforced or
22 state's interest or state's rights. Isn't a little curious for
23 the state attorney general to say that the federal interests
24 being protected here are more predominant over the state
25 interests?

1 see no reason not to take a lunch break and just return at 1:30
2 in a normal civil manner. Does anyone have any objections to
3 that or does that work for everyone? Okay. Well, if that
4 works, we will take a recess and we'll see you back here at
5 1:30 and hear from the State. We'll be in recess.

6 (Recess.)

7 THE COURT: Well, we assume everyone is well fueled
8 and we are ready to wrap these issues up. At this time, unless
9 there's something preliminary, we recognize the State for
10 argument in connection with the attorney-client privilege
11 issues.

12 MR. NANCE: Excuse me, Judge. I'm Bob Nance appearing
13 on behalf of the State of Oklahoma, Your Honor. As regards the
14 attorney-client privilege issue, it's the federal common law of
15 privilege which applies in this case rather than any aspect of
16 Oklahoma statute. The Court is probably aware, but this is a
17 federal question case filed under CERCLA, RCRA, and the federal
18 common law of nuisance. It also raises pendent state claims
19 for nuisance, trespass, unjust enrichment, and several
20 statutory violations.

21 And we began, as did counsel, with the Sprague vs.
22 Thorn Americas case which I think is in both briefs, where the
23 Tenth Circuit noted that permitting evidence inadmissible for
24 one purpose to be admitted for another defeats the purpose of a
25 claim of privilege. The moment the privileged information is

1 divulged, the point of having the privilege is lost, and that's
2 when the Court said we need an analytical solution, whereas
3 here we have a federal question case with pendent state claims.
4 The Court may note and if you haven't, I would ask you to go
5 back and look in the Sprague case. At footnote 7 on page 1369,
6 they list a group of cases that have dealt with similar issues.
7 And in each and every one of those listed federal question
8 cases with pendent state claims the courts resolved the issue
9 by applying the federal common law of privilege. The
10 analytical framework that applies in this case is that when
11 federal claims and state claims are asserted and the privilege
12 law is different, as it is here -- that was one of your
13 questions -- and the result would be different if Oklahoma's
14 privilege law applied.

15 THE COURT: Well, tell us how, I mean, either now or
16 later.

17 MR. NANCE: Well, in federal court it's just the
18 federal common law of privilege as has been developed
19 historically based on reason and experience and it covers
20 advice basically or communications rendered to get -- to
21 facilitate legal services whether or not there is litigation
22 involved. It doesn't have to have litigation applied. In the
23 state statute that Ms. Longwell invited your attention to, one
24 of the -- that's 2502(D) (7), there are -- there are a number of
25 preliminary things which I think are pretty standard and would

1 MR. NANCE: Well, no, it's not because the state
2 attorney general has filed federal claims. He is here to
3 enforce, among other things, federal law, CERCLA, RCRA, and the
4 federal common law of nuisance. And anyone who came to this
5 court and filed a case like that would be bound by the federal
6 common law of nuisance. And if they had a pendent state claim,
7 they would still be bound by the federal common law of
8 nuisance. And this is not a case -- it would be unprecedented
9 basically to have a dichotomy of privilege law in a federal
10 case where they get one rule of privilege and we have to have
11 another rule of privilege.

12 THE COURT: Right. No, that won't work.

13 MR. NANCE: Precisely so, Your Honor. I mean, there
14 are all kinds of policy reasons that we could argue about,
15 about how it would chill the communication between the attorney
16 general and various state agencies if they knew that until
17 there was a pending claim or case, what they say could be found
18 out. Now --

19 THE COURT: But that would be true if it was a state
20 case.

21 MR. NANCE: It would indeed. It would indeed or
22 might. And I just want to touch on this point lightly. Even
23 if the state law were to apply, the state law of
24 attorney-client privilege were to apply, in the matters on, I
25 believe it's their Exhibit 8, that's the list of privilege log

1 issues that they have -- that they have challenged. The state
2 law of privilege, if it were to apply, and it shouldn't, and
3 under the controlling authority we think it doesn't, there has
4 to be a pending investigation, claim, or action. An
5 investigation is enough to trigger the attorney-client
6 privilege. And for someone who has been kind of a serial
7 subject of state regulatory action like Jock Worley, there are
8 a lot of investigations pending, even when there may not be an
9 administrative or a court claim pending, there are
10 investigations because you're trying to figure out what's going
11 on. The same for some place like Sequoyah Fuels. That's been
12 an issue for a long time. And the attorney general and various
13 state agencies have had to deal with that in administrative
14 proceedings, in the Tenth Circuit, and in investigations and in
15 trying to settle it and get it cleaned up.

16 So it's not quite, even under the state law, it's not
17 as simplistic a question as counsel may have wanted you to
18 believe. And it would require, in every instance, a judicial
19 determination, if the state law applied, whether or not it's
20 going to seriously impair whatever is going on or whatever went
21 on. So unfortunately, that puts the Court smack in the middle
22 of each and every -- each and every item on the privilege log,
23 if that's the way the law shakes out, and it shouldn't.

24 THE COURT: You got my attention with that argument.

25 MR. NANCE: Thank you. I was hoping I would say

1 affidavits and such. And the Court of Appeals said well, no,
2 that stuff is privileged even after the case is over because if
3 a defendant knew that what his lawyer had to submit to the
4 Court to get paid was going to be disclosed publicly, that
5 client would be reluctant to speak candidly to the lawyer for
6 fear that somebody, somewhere, someday would be able to get
7 ahold of it. The importance of the doctrine is well
8 established. It extends beyond the death of the client, which
9 hopefully the State of Oklahoma is not going to have that
10 problem. And it doesn't terminate when the trial is over and
11 particularly in the criminal context.

12 I think you were correct, I think, in a question that
13 was at least implied to Ms. Longwell that the Open Record Act
14 does not apply. This is not an Open Record Act situation.
15 There was a great deal of talk about the Open Record Act, but
16 the Open Record Act recognizes the force and effect of
17 evidentiary privileges. And so the fact that someone can go
18 and get an open record, they still can't get attorney-client
19 privilege, they still can't get work product. They might get
20 everything else that we produced, but they can't get that under
21 the Open Record Act and the Open Record Act doesn't apply here.

22 There was some suggestion in their brief that it was
23 odd that we have claimed privilege for privileged documents
24 that were in the agency files. Well, the clients get
25 privileged documents just like the lawyers. We're not the only

1 which isn't certainly not determinative but, you know, we have
2 a classification called attorneys' eyes only group privilege or
3 for a protective order in this case. I mean, what great
4 calamity would befall the State of Oklahoma if I just said the
5 defendants are right, all of this stuff needs to be produced
6 pursuant to attorneys' eyes only? I mean, is the earth going
7 to stop, is there some great prejudice, is there some pending
8 litigation you have that's going to immediately go to hell
9 because of some production you've had to make?

10 MR. NANCE: Probably the earth would not stop, I think
11 we can agree about that. But once the privilege is out, I
12 mean, it's out. I hadn't thought through what the waiver
13 issues would be once it was -- once the toothpaste is out of
14 the tube, whether Sequoyah Fuels could come in and say, well,
15 it's out of the tube, we want everything you produced over
16 there. We want your work product with regard to us and what
17 your experts say and what your legal strategies are.

18 THE COURT: I hadn't thought about that. I don't know
19 whether it would waive it for third parties or not.

20 MR. NANCE: And neither do I. You've just posed a
21 question and I haven't had a time to think about that as the
22 question deserves.

23 THE COURT: Okay. Well, let me ask you another
24 question that you haven't had time to think about either. They
25 are arguing that some of what's on your privilege log describes

1 what other sources have placed into the environment as an
2 alternative source of pollution to the watershed and that
3 there's information within these privileged documents that talk
4 about, I suppose, Jock Worley or Sequoyah Fuels or anybody's
5 contribution to the watershed that would have caused the
6 effects you say they have caused. Is that true?

7 MR. NANCE: I can't speak for all of the documents.
8 It might be that some of those documents deal with some of the
9 constituents that are at issue in this case. Sequoyah Fuels
10 really doesn't unless things can migrate uphill.

11 THE COURT: Right.

12 MR. NANCE: And so I don't think that's really an
13 issue there.

14 THE COURT: Okay. Well --

15 MR. NANCE: That goes to whether or not they have an
16 extraordinary need and no other way to get to our attorney-
17 client or work product documents. And counsel, I think counsel
18 pretty well conceded that we have given a vast amount of
19 documents, particularly about Sequoyah Fuels. We've given them
20 Jock Worley's entire permit work file. There is a great deal
21 of material there that is unprivileged we have not claimed any
22 privilege for that they have got that I think takes away any
23 extraordinary need they might claim to have the work product
24 stuff.

25 THE COURT: Well, if there is documents for which your

1 attorney is claiming a privilege which describes other
2 discharges into the IRW, is it really fair for you to come in
3 and sue them alleging that they have caused all of these
4 detrimental effects to the IRW and have within your own files
5 evidence that other people have contributed to that problem,
6 and say, well, but you can't have it or you can't see it
7 because it's covered by attorney-client privilege?

8 MR. NANCE: Well, only the things that are privileged
9 are the things that we haven't given them.

10 THE COURT: I understand that.

11 MR. NANCE: We've given them the full array of
12 everything else. If they want to make a case that Jock Worley
13 has caused the pollution in the Illinois River, or that
14 Sequoyah Fuels has somehow put phosphorus upstream in the
15 Illinois River, they have everything but the privileged
16 material that we've got to allow them to do that. So yes, it's
17 fair for us to do that.

18 THE COURT: But I think you said that within those
19 privileged documents is some evidence of what Jock Worley
20 contributed to the environment.

21 MR. NANCE: Well, but to get that evidence, they've
22 got to have an extraordinary need and they don't.

23 THE COURT: Right, I understand that. Well, getting
24 to the last issue about which you have not thought probably.
25 When you filed your lawsuit, did you not put at issue the